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BOOK REVIEW – CRITIQUE BIBLIOGRAPHIQUE

Comparative Law: A Handbook, E. Öricü and D. Nelken (eds.) [Oxford: Hart Publishing, 2007] 480pp

At the launch of *Comparative Law: A Handbook* (hereinafter the *Handbook*) organised at the Society for Advanced Legal Studies in December 2007, Esin Öricü expressed her concern that too much methodology in comparative law focused on private law. The publication of this book changes this for good. It aims to cover both theoretical and substantive law and introduces areas of comparative law that have been little considered until now.

To start with, one of the main advantages of the *Handbook* is that it is 'student-friendly' and each chapter has a glossary, a list of questions and a further bibliography. The book is divided into three parts. Part 1 'Comparative law at a cross-road' includes two chapters and is a general introduction to comparative law. Part 2 'New directions for comparative law' includes seven chapters on some of the theoretical challenges that are currently facing comparative law. Part 3 'New territories for comparative law' includes ten chapters on substantive contemporary areas of law.

The first part of the *Handbook* raises a number of questions about the aims and methods of comparative law. The question is raised whether comparative law is 'an end in itself' or 'more interested in comparing rules and institutions for the practical purposes of adjudication and law reform.'¹ Öricü notes the newly used title of Comparative Legal Studies.² There is also the question of which sources to turn to—however Werner Menski³ is the only one to really consider cultural pluralism and to talk about the place of religion in comparative law. Öricü also raises the question about the purposes of comparative law. She notes that 'as there is no one identifiable method, there is no one identifiable purpose, there is a multiplicity of purposes [and] research has moved in a number of different directions'.⁴ She then lists some of the purposes: to improve and consolidate knowledge of the law and understanding of the law in context, to group legal systems, to broaden the mind and develop tolerance, to engage in legislative law reform, to provide a tool of interpretation for judges (by making them aware of foreign solutions to similar problems when there are none at home), to draw up international conventions and agreements and to harmonise the law. Öricü's list is more comprehensive than that of Zweigert and Kötz, who see comparative

¹ D. Nelken, 'Comparative Law and Comparative Legal Studies', in (ed.), E. Öricü and D. Nelken, *Comparative Law: a Handbook*, Hart Publishing (2007): pp. 3–42, pp. 12–13.

² E. Öricü, 'Developing Comparative Law', pp. 43–66, p. 47.

³ W. Menski, 'Beyond Europe' pp. 198–216.

⁴ Öricü, 'Developing Comparative Law', p. 53.

law as an aid to the legislator, as a tool of construction, as a component of the curriculum of universities, as a contribution to the systematic unification of law and to the development of a private law common to the whole of Europe.⁵ In any case, Öricü's chapter is interesting because it is a good reminder of why people engage in comparative studies.

The second part of the *Handbook* provides a theoretical overview of new directions for comparative law. There are discussions on globalisation, the concept of legal culture, diversity, economic approaches, legal families and mixing systems, and the consideration of non-western systems. William Twining says that a 'picture of law in the world that focuses only on the municipal law of nation states and public international law would be much too narrow'.⁶ H Patrick Glenn argues that the concept of 'tradition' allows for a better understanding of other laws, Nelken uses the concept of 'legal culture', while Öricü argues that current classifications of families are outdated and that an entirely fresh approach is needed.⁷ Anthony Ogus discusses the links between law and economic growth.⁸ Finally, Menski highlights the richness of non-Western legal systems through a case study on Indian divorce law.⁹

The third part of the *Handbook* covers constitutional and administrative law, human rights, criminal justice, private law, family law and commercial law. There are also more 'practical' chapters on the use of comparative law by the courts, law reform and research methodology. John Bell goes back to an area he knows well, comparative administrative law. He covers the definition of administrative law, the distinction between private and public law, the allocation of powers and the liability of the administration. Several European countries are covered and the chapter is substantial and well-informed. Andrew Harding and Peter Leyland devote a chapter to comparative law in constitutional contexts, which fits in well with Hart Publishing's new series on Constitutional Systems of the World.¹⁰ They first describe different types of constitutions (for example what they do, their special status and procedures for amendment) then engage in a more substantive analysis of what comparative constitutionalism is and how it is a fairly new topic. They next point out that practical applications include constitution-making and human rights adjudication, such as interesting developments before the Council of Europe.¹¹ For example, Steven Greer argues that the European Court of Human Rights 'is already a constitutional, or "quasi-constitutional" court, in the sense of being the final authoritative judicial tribunal for a specific constitutional

5 K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, Oxford University Press (1998), p. 16.

6 W. Twining, 'Globalisation and Comparative Law', pp. 69–90, p. 71.

7 Öricü, 'A General View of "Legal Families" and of "Mixing Systems"', pp. 169–90, p. 169.

8 A. Ogus, 'The Economic Approach: Competition between Legal Systems', pp. 155–68.

9 Menski, 'Beyond Europe'.

10 A. Harding and P. Leyland, 'Comparative Law in Constitutional Contexts' pp. 313–38. See also J. Goldworthy (ed.), *Interpreting Constitutions, A Comparative Study*, Oxford University Press (2007).

11 Harding and Leyland, p. 328.

276 *Book Review – Critique Bibliographique*

system designed to ensure that the exercise of public power throughout Europe is constitution-compliant'.¹²

The chapter would have benefited from a bit more on comparative constitutional adjudication but this was probably precluded by space considerations. Paul Roberts delivers a lengthy chapter on international criminal justice. First he argues that there are seven concentric circles: the International Criminal Court, UN ad-hoc tribunals such as the International Criminal Tribunal for the Ex-Yugoslavia and the International Criminal Tribunal for Rwanda, internationalised or hybrid courts (such as in Sierra Leone and Iraq), the Nuremberg International Military Tribunal, trans-national criminal law (such as international cooperation and mutual judicial assistance), the work carried out by national criminal courts and military tribunals and the contribution of scholars and researchers. The chapter then turns to the contributions of comparative law to the international criminal justice project. For example, it helps in designing the institutional frameworks of international criminal law, to assess how the adversarial and inquisitorial systems can help, to draft compromises for international judges and help to understand each other, to contribute to policy-making and mutual judicial assistance and to delegate work to national courts. Roberts' chapter is valuable in that it does not only describe international criminal justice but also assesses what comparative law can bring.

Next, Christopher McCrudden focuses on judicial comparativism and human rights. In particular, he considers the use of foreign decisions in the caselaw of constitutional courts, which ties in well with Harding and Leyland's chapter. What is particularly interesting is the growing use of foreign decisions by the US Supreme Court, which is usually adverse to it. McCrudden finishes by suggesting that there has been 'an identifiable move to use comparative approaches as one of the techniques of trying to reach "solutions" to issues of human rights interpretation'.¹³

Jan Smits comes back to the well-known debate about the harmonisation of laws in European countries. Taking the example of private law, he argues that uniformity across Europe is not reachable although harmonisation is possible. It would not be possible to have a compulsory European Civil Code because there is no European system of private law, lawyers from the common law tradition are not familiar to the concept of a comprehensive code and EC law does not allow for the harmonisation of private law other than contract law. Law is still very much linked to the history and cultural identity of a country and it is hard to overcome lawyers' lack of knowledge of foreign law. Masha Antokolskaia then retraces the evolution of family law across Europe since the 1960s. She argues that there have generally been similar evolutions in the concept of marriage and relationships (for example regarding spousal equality and births outside wedlock) although some differences remain, such as the availability of same-sex partnerships and

12 S. Greer, 'Protocol 14 and the future of the European Court of Human Rights' *Public Law* (2005): 83–106, p. 105.

13 C. McCrudden, 'Judicial Comparativism and Human Rights', pp. 371–98, p. 393.

same-sex marriages. Family law has been hard to harmonise but the international Commission on European Family Law has been working on issues such as the obligations of former spouses, parental responsibilities and grounds for divorce. Nicholas Foster compares English and French commercial law and argues that they both result from historical processes in which differing attitudes and cultures to commerce have produced different results.

Sjef van Erp discusses the difficulties of legal transplants through considering the role of lawyers in the reform process of communist states in transition and how comparative law was used as a comparative tool. Taking the example of judges he points to the need to train them about the rule of law and independence.¹⁴ More generally he discusses the difficulties of legal transplants, especially in choosing experts (who need to have some knowledge of the pre-existing law). This chapter is more about method but is interesting nonetheless – one can think of assistance provided to post-communist countries by the Organization for Security and Co-operation in Europe in drafting and reviewing legislation. Örüci finishes the *Handbook* with two chapters on the role of comparative law in legislative law reform and empirical work. She first considers the use of foreign cases by English and civilian courts, which complements McCrudden's chapter on the use of foreign decisions by constitutional courts. When analysing when and how British courts use foreign law, she concludes that judges often turn to foreign jurisdictions in order to develop the law, when the law is inadequate or to achieve some sort of uniformity with the civilised world – however in doing so they look more at common law rather than civil law jurisdictions. She argues that the use of foreign law and foreign cases is selective, that there is no logical approach as to choice, no specific methodology and that it is very much up to judicial discretion. However she concludes that '[D]omestic courts must look forward, sideways, at each other and beyond. Comparativism must be at the heart of all judicial activity if law is to embody principles that are 'universal' rather than purely domestic or even "European"'.¹⁵ Finally Örüci returns to an empirical project carried out in the 1980s, involving the relationship of Scottish and Dutch lawyers with EU law. This chapter is slightly odd in the light of the other chapters and can only be taken for what it offers: methodology as to how to carry comparative research.

The *Handbook* is a welcome addition to the literature. One of its benefits is that comparative law is put into context as it is considered from both theoretical and substantive perspectives. Yet, this reader preferred the third part as it is more substantive and it will probably be easier for students to grasp – the chapters on public law were especially welcome. A wide range of topics is covered and this will allow lecturers to 'pick and choose' whichever topics are most suited to their course.

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14 S. Van Erp, 'Comparative Private Law in Practice: the Process of Reform', pp. 399–410, p. 405.

15 Örüci, 'Comparative Law in Practice: The Courts and the Legislator', pp. 411–34, p. 432.